IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.483 OF 2004

M/s.City & Industrial Development Corpn. Of Maharashtra. ... Petitioners

vs.

M/s.Central India Builder. .... Respondents.

Mr.G.S.Hegde with C.M.Lokesh i/b. Hegde & Associate, for Petitioners.

Ms.S.Srikrishna i/b. Shantilal & Co. , for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 6th September,2005

P.C.:-

1. By this petition, the petitioners challenge the Award made by the sole Arbitrator dated 12.1.2004. It appears that the same Arbitrator had made the Award dated 30.4.1998 thereby awarding separate amounts under the different heads in favour of the Respondents. That Award was challenged in the Arbitration petition no.465 of 1998. By order dated 7th January,2002 the Award was set aside and the learned Arbitrator was directed to decide the question of limitation and to decide the further question in accordance with the law. After

the remand, the present Award has been made by the learned Arbitrator. Though the learned Arbitrator has awarded the amounts by the First Award and the Second Award under different heads, before, me the challenge to the Award is restricted to the amount awarded under the head of escalation. The claimants had made a claim for escalated price of the items used during the extended period of contract. By the first Award, the learned Arbitrator had awarded the amounts of Rs.2,81,230/- and Rs.4,11,732/-. It is submitted that the amounts awarded under this head is contrary to Clause 25 of the Agreement between the parties. It is submitted that it was contended before the learned Arbitrator that because of clause 25, no escalation can be granted, but the learned Arbitrator had not considered the objection. It is further submitted that the learned Arbitrator has held that because the petitioners had granted extension of time for completion of the work from time to time without imposing any fine, the Respondents is entitled to the escalated prices. It is submitted on behalf of the petitioners that the learned Arbitrator himself has noted in the Award that every time when the extension was needed, an application was made by the Respondents seeking extension and every time the Respondents had given in writing that the Respondents would not put up any claim on the basis of extension granted. This aspect of the matter also has not been considered, according to the petitioners, by the learned Arbitrator. On behalf of the Respondents on the other hand it is submitted that though it is stated that the clause 25 is not considered by the learned Arbitrator, the clause 25 is subject to clause 75 of the General Conditions of the Contract and therefore, there is no

absolute ban on the grant of escalation. According to the learned Counsel, as there is no absolute ban on the grant of escalation, the learned Arbitrator is justified in allowing the escalation in prices because on several occasions extension of time was granted by the petitioners without imposing any condition and that made the respondents entitled to the escalation in the prices.

2. If in the light of these rival submissions, the record of the case is perused, it is clear that by the first Award, the learned Arbitrator had awarded amount of Rs.2,81,230/- and Rs.4,11,732/- on account of escalation of prices. That Award has been confirmed by the learned Arbitrator by the second Award which has been delivered after the remand. There is no dispute between the parties that an objection was raised on behalf of the petitioners that because of clause 25 of the Contract between the parties, the respondents are not entitled to the escalation in the prices. Clause 25 is relevant which reads as under:-

> "25.0. ESCALATION :
>
> No escalation shall be paid due to increase in the prices of oil or other commodities from the date of issue of tender to the date of completion except for the provision in clause no.75 under General Conditions of Contract."

Perusal of clause 25 shows that it prohibits grant of escalation of prices except

where the escalation is permitted under clause 75 of the general conditions of the contract.

The Clause 75 of the General conditions of the Contract reads as under:-

> "75. Reimbursement/refund on variation in prices :
>
> If after submission of the tender and/or during the progress of works, the price of any material (not being a material supplied from the Corporation's stores in accordance with the conditions of the contract) is increased or decreased by an Act of Legislature (Central or State) and/or any notification thereunder or on account of new duties or levies such as Octroi or on account of increase or decrease in such duties affecting the price of materials required for incorporation in the works or the price of any item to be incorporated in the works and made from the materials of which the price has increased or decreased as aforesaid and the contractor thereupon to pay in respect of such materials or item, a price which is higher or lower than the price of that material or item as prevailing immediately before the passing of such Act or levying, increasing/decreasing of such duty, the

> Corporation shall in case of increase in price reimburse to the Contractor the increase in price or the additional or increased duty paid by the contractor and in case of decrease in price the Corporation shall be entitled to a refund of the reduction in price or the reduction in duty, provided, however no reimbursement or refund shall be made if the increase/decrease is not more than 5 percent of the said price, and, if so, the reimbursement or refund shall be made only on the excess over 5 percent, provided that any increase will not be payable if such increase had become operative after the contract or extended date of completion of the works or items of works in question."

The combined reading of clause 25 of the Contract between the parties and Clause 75 of the General Conditions of the Contract shows that escalation in price can be allowed to the contractor only when the prices of items have been raised because of taxes imposed and levies under the Legislation of the competent legislature. Therefore, whenever a claim is made for escalation by a Contractor in view of the provisions of clause 25 and clause 75 quoted above, the Arbitrator would be under a duty to consider escalation of prices in relation to each item and to find out how much increase in prices has occurred because

of increase in the Tax and how much increase in the prices because of market condition. Therefore, it goes without saying that the learned Arbitrator has to apply his mind to the provisions of clause 25 and clause 75 quoted above and to apply them to each item in relation to which escalation in prices is sought It is further pertinent to note here that clause 25 does not operate only during the period of contract but it applies even the extended period of contract, because clause 25 in terms states that no escalation shall be paid due to increase in the prices of a commodity from the date of issuance of tender till the date of completion of the work. Thus, it is clear that clause 25 will operate whether the completion of work is during the contract period or after the expiry of the contract period i.e. during the period extended by the petitioners. Perusal of the Award shows that the learned Arbitrator has not at all applied his mind to the provisions of Clause 25 and Clause 75. It is further pertinent to note that by the Award, the learned Arbitrator has held that because the extension of time was granted by the petitioners without imposing any fine, the contractor becomes entitled to the escalated prices. The learned Arbitrator, however, failed to consider that at the time of claiming extension of time, each time the respondent-contractor has given in writing that no claim would be made by the Contractor on the basis of the extension granted. The learned Arbitrator has brushed aside this commitment made by the respondents by observing that it was a practice of the petitioners to get such letters from the respondents and thereby holding that getting such letters from the contractors at the time of giving extension is merely a formality and not to be acted upon by the parties.

Such findings could have been recorded by the learned Arbitrator only on the basis of oral statement made by the Contractor. The parties must establish the practice by leading oral evidence and thereby proving the oral contract between the parties that though in writing a commitment is made not to raise any claim on the basis of extension, it is orally agreed between the parties that the contractor is entitled to act contrary to the commitment made. In my opinion, in the absence of any oral evidence establishing the alleged practice, the learned Arbitrator would not have ignored the commitment made by the Contractor at the time of seeking extension of time. For all these reasons, therefore, in my opinion, no amount could have been awarded by the learned Arbitrator on account of escalation in prices. The award made by the learned Arbitrator to the extent of awarding amount on account of escalation in prices, is set aside. So far as the amount awarded by the learned Arbitrator under other heads are concerned, there was no challenge on that, therefore, I set aside the Award to the extent that it directs payment of amount of Rs.2,81,230/- and Rs.4,11,732/- to the respondents. By consent of parties therefore, I modify the Award made by the learned Arbitrator and direct that the Respondents shall not be entitled to recover any amount as awarded by the Award on account of escalation in prices. Rest of the Award is maintained. The petition is disposed of. There shall be no order as to costs.